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IN THE

Supreme Court of the United States

OCTOBER TERM, 1957

No. 541

MICHIGAN CONSOLIDATED GAS COMPANY, *Petitioner*

v.

FEDERAL POWER COMMISSION, PANHANDLE EASTERN PIPE LINE COMPANY, UNION GAS COMPANY OF CANADA, LIMITED, *Respondents.*

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

BRIEF FOR PANHANDLE EASTERN PIPE LINE COMPANY IN OPPOSITION

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OPINIONS BELOW

The opinion of the Court of Appeals, affirming the opinion and order of the Federal Power Commission, is reported at 246 F.2d 904 and is reprinted in an appendix to the petition for certiorari (Pet. App. 6a).

The opinion and order of the Federal Power Commission (R. 1290-1337) are reported at 15 F.P.C. 46 and the Commission's order denying rehearing (R. 1384-8) is reported at 15 F.P.C. 870.

JURISDICTION

The judgment of the Court of Appeals was entered on July 16, 1957 (Pet. App. 22a). Petitioner sought review in the court below under Section 19(b) of the Natural Gas Act, 15 U.S.C. § 717 r(b), and seeks further review in this Court under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the court below committed any error of law in affirming the Federal Power Commission's order permitting Panhandle Eastern Pipe Line Company, as part of an overall expansion program, to sell additional quantities of surplus interruptible gas to an existing utility customer in Canada.

STATEMENT

Panhandle Eastern Pipe Line Company is an interstate transmission company which supplies natural gas to more than fifty utility customers, one of which is Union Gas Company of Canada, Limited, serving Windsor and Hamilton and other areas of southwestern Ontario immediately adjacent to the United States border. Michigan Consolidated Gas Company, a subsidiary of the American Natural Gas Holding Company system, purchases gas from Panhandle, but receives the great bulk of its supplies from two affiliated pipelines, American Louisiana Pipe Line Company and Michigan-Wisconsin Pipe Line Company. Controversies between Michigan Consolidated

and Panhandle, stemming from these relationships, have been continuous during the past nine years, fourteen of such cases having reached United States Courts of Appeal during that period.

In the present chapter of the controversy, the court below affirmed a Federal Power Commission order authorizing Panhandle to expand its capacity by 30%, from 970,000 to 1,245,000 Mcf per day so as to provide large additional volumes of gas for its existing utility customers in the United States. After providing for those requirements, the Commission found that the expansion program would provide sufficient capacity, even in periods of peak demand, to supply more than 25,000 Mcf per day to sixteen new utility customers in the United States.

Accordingly, the Commission authorized Panhandle to deliver the peak day volumes contracted for by its existing and potential utility customers, as well as all of the off-peak gas which they wished to purchase. In addition, the Commission approved the sale of annual volumes of off-peak gas aggregating 62,000,000 Mcf to utility customers in the United States for storage, and 15,500,000 Mcf of interruptible gas to Panhandle's utility customer in Canada, Union Gas.

The balanced program which Michigan Consolidated attempted to overturn, was the product of long and continued cooperative efforts of Panhandle and its resale customers which are now receiving the benefit of the Commission's authorizations. In December, 1953, shortly after completing its previous large expansion program, Panhandle canvassed its resale customers as to their desire for additional volumes of natural gas, and their responses indicated that a further expansion would be warranted.

Since gas requirements vary with temperature conditions, the construction of facilities capable of meeting maximum demands on the system during the coldest day, results in substantial excess capacity throughout the balance of the year. It was apparent from the estimates furnished by Panhandle's customers in the United States that, in order to make further expansion economical, some means would have to be found for disposing of excess summer and off-peak capacity which would be provided from the expanded main line system.

The development of a storage field was only a partial solution to the problem because such a field would accommodate only a minor portion of the surplus off-peak capacity which would result from the expansion. Panhandle had recently acquired, and was developing in conjunction with one of its utility customers, a large gas storage reservoir, known as Waverly Storage Field, located along Panhandle's main line in central Illinois. But the storage field requirements amount to only 4,000,000 Mcf annually (R. 800). A limited volume of off-peak gas could also be sold to resale customers in the United States owning storage fields, but there remained a very substantial amount of off-peak capacity which was completely surplus to the needs of Panhandle's customers in the United States.

This surplus gas was urgently needed by Panhandle's resale customer in Canada, Union Gas, until that company commences receiving gas from Trans Canada Pipe Line Company. Accordingly, after providing for the requirements of its customers in the United States, Panhandle entered into agreements with Union Gas to dispose of surplus gas up to

15,500,000 Mcf per year, all of which is delivered during off-peak periods.

Union Gas, a long-standing utility customer of Panhandle, owns and operates storage fields which enable it to deliver gas to its customers without receiving any firm or peak day supplies from Panhandle. Commencing with the authorization granted by the Commission in 1946, Panhandle has made interruptible sales of 5,500,000 Mcf per year to Union Gas. These volumes, together with local production, have been insufficient to enable Union Gas adequately to serve its markets, and it has been unable to provide any natural gas service whatever to a portion of its franchise area.

Both Union Gas and the Canadian government were anxious to relieve this shortage at the earliest possible time, and the Canadian government was particularly anxious to develop the potential of this market so as to assist in the financing of Trans Canada Pipe Line, which, upon completion, would displace Panhandle as the supplier (R. 248-50; R. 347). Accordingly, Panhandle's agreements with Union Gas provide for automatic termination of purchases under the new contract, one year after Trans Canada Pipe Line, presently under construction, commences providing substitute service to Union Gas (R. 652-3).

Immediately upon the consummation of these agreements with its customers in the United States and Canada, Panhandle filed its application with the Commission, requesting authority to complete the third loop of its main line and to install additional compressors, as well as to operate, upon completion, its Waverly Storage Field. Shortly thereafter,

Panhandle requested authority for the increased deliveries to Union Gas, pursuant to Section 3 of the Natural Gas Act. Since Panhandle's facilities at the Canadian border were adequate to handle the increased volume, no further facilities authorization was required.' The Commission consolidated these applications with certain other matters not relevant here.

Simultaneously, the American Natural Gas Holding Company system, of which Michigan Consolidated is a subsidiary, was proceeding with the construction of its second new pipeline, American Louisiana Pipe Line Company, for the sole purpose of delivering large additional volumes of gas to Michigan Consolidated, and to Michigan-Wisconsin, another affiliated pipeline whose principal customer is also Michigan Consolidated. Accordingly, Michigan Consolidated has maintained throughout this proceeding its position that it does not need and is unwilling to purchase from Panhandle any additional volumes of peak-day gas or storage gas (R. 479-81; 484).

Nevertheless, Michigan Consolidated intervened in Panhandle's certificate proceedings. It also intervened in opposition to Panhandle's export proposal, and actively solicited Panhandle's other customers, in a determined effort to arouse their opposition. This campaign was completely unsuccessful; Panhandle's other customers supported the expansion program, and not a single one opposed the increase in deliveries to Union Gas.[1]

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[1] While Michigan Consolidated was attempting to prevent Panhandle from increasing its deliveries to Union Gas, its affiliated pipelines, Michigan-Wisconsin and American Louisana, were and still are vigorously opposing the efforts of Trans Canada Pipe Line to export 200,000 Mcf per day *into the United States* so as to assure

Shortly after the hearings commenced it became apparent that the development of Waverly Storage Field would not be completed as rapidly as had been anticipated. Panhandle immediately amended its applications so as to supply large additional volumes of gas through its subsidiary, Trunkline Gas Company, in place of peak-day volumes which were to have been delivered from the storage field. Because Trunkline's expansion provided deliveries throughout the year, instead of only in the winter, the net effect of this substitution was to provide substantially greater volumes on an annual basis, together with somewhat lesser increases in peak-day deliveries (Pet. 9a).

The substitution of facilities had very little impact, because Panhandle's two largest customers, Michigan Gas Storage Company and The East Ohio Gas Company voluntarily reduced their requests for peak-day gas and agreed instead to take off-peak gas into their own storage fields to meet their winter requirements. Under contractual arrangements, when Panhandle's Waverly Storage Field has been completed, these customers will revert to peak-day deliveries available from Waverly, and off-peak gas they are now taking will be injected by Panhandle into its storage field. Thus, under either arrangement, the volumes Panhandle proposed to deliver to Union Gas were surplus to any requirements of Panhandle's customers in the United States.

During the course of these protracted proceedings, and prior to issuance of any permanent certificates, it became necessary from time to time for Panhandle

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its ability to construct a pipeline across Canada. 16 F.P.C. 466-486 (1956). Nevertheless, Trans Canada's project is nearing completion and Union Gas will soon receive deliveries from Trans Canada.

to install portions of its new facilities under temporary authorizations. Michigan Consolidated vigorously and persistently opposed each request even though all the increased volumes of firm and storage gas were proposed to be supplied to utility customers *in the United States,* and despite the fact that Michigan Consolidated itself remained unwilling to purchase any of those volumes. Thus, because of the unprecedented length of these proceedings, most of the facilities were constructed and most of the sales were commenced on a temporary basis prior to the determination of the export issue. Accordingly, Michigan Consolidated turned to the export proposal and intensified its efforts to defeat that project.

The sales complained of were unanimously approved by the Commission. The Court of Appeals unanimously affirmed this action. The Secretary of State and the Secretary of Defense have favorably recommended the authorization as being consistent with the objectives of the government,[2] and a Presidential permit has been issued.[3] Michigan Consolidated requested no stay in the Court of Appeals, and Panhandle is presently performing the service.

ARGUMENT

Although Petitioner asserts that "this case presents important questions involving the authority and statutory duties of the Federal Power Commission," the questions discussed in the petition cannot be reached without first reversing the Commission's

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[2] See Exec. Order No. 10485, 18 Fed. Reg. 5397.

[3] F.P.C. Docket No. G-10798.

basic findings of fact which have been affirmed by the court below.[4]

Each of Michigan Consolidated's arguments starts with the erroneous assumption that the export deliveries authorized by the Commission have impaired Panhandle's ability to render adequate service to its customers in the United States. Of course, any informed conclusion as to "impairment" must be based upon thorough study of the pipeline's gas reserves, customer requirements, physical capacity, load characteristics and other matters within the special competence of the Federal Power Commission. *Manufacturers Light & Heat Co.* v. *Federal Power Commission*, 206 F.2d 404, 407 (3d Cir. 1953).

After carefully considering those factors, the Commission specifically found that no impairment, or threat of impairment exists (R. 1386-7), and these findings were affirmed by the court below (Pet. App. 15a). Since this Court is not the forum in which to re-try questions of impairment, Michigan Consolidated has simply premised its arguments here upon a state of conditions exactly opposite to those which have been found to exist. Correction of this fundamental error exposes the insubstantiality of each of the contentions which Michigan Consolidated presses upon this Court.

For example, Michigan Consolidated's first argument is that the Commission erred in permitting Union Gas to share in Panhandle's expansion program because, "there are unsatisfied domestic requirements

[4] Michigan Consolidated also discusses problems which have arisen in a variety of cases previously disposed of, but which are completely extraneous to this case. See fn. 7 and 10-15.

for such gas" (Pet. 10). But, the question whether the Commission is prohibited by law from permitting gas to be exported if there are unsatisfied domestic requirements is never reached, because it has been established that, "the gas to be exported to Union is non-peak interruptible gas which would be of no use to" domestic customers (Pet. App. 15a).

Similarly, Sen Wheeler's remark concerning conservation of gas in times of "shortage" (Pet. 10) is completely irrelevant here in view of the Commission's unequivocal finding that "Panhandle's proven reserves are ample to meet all its market requirements for the projects it proposes, including the exportation in issue; and in view of the volumes of interruptible gas involved, denial of the increased export deliveries would not be a substantial benefit to Panhandle's resale customers in the United States" (R. 1317).[5]

Michigan Consolidated next attacks the phraseology of the condition which the Commission imposed in Panhandle's export permit to facilitate its modification in the event the public interest later requires that action (Pet. 11-12). However, Section 3 of the Act specifically provides that export authorizations are to be granted, "upon such terms and conditions as the Commission may find necessary or appropriate."

Michigan Consolidated's contention is that the difference between the condition imposed by the Commission in this case and the condition imposed in 1946 represents a "radical departure from prior policy,"

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[5] It may be noted that the colloquy quoted by Michigan Consolidated culminated in the elimination of Section 3 (dealing with export) from the bill then being debated by the Senate (81 Cong. Rec. 9313). The Natural Gas Act was enacted by a subsequent Congress, without any discussion of Section 3 (83 Cong. Rec. 8347).

requiring correction by this Court.[6] If this view were to prevail, it would simply mean that the Court would be formulating a standard condition for inclusion in all export authorizations. But, the formulation of conditions "is an administrative, not a judicial, decision," *Federal Power Commission* v. *Idaho Power Co.*, 344 U.S. 17, 21 (1952), because Congress specifically entrusted that function to the Commission in recognition of its familiarity with the facts in each individual case.[7]

Without attempting to enumerate the differences in circumstances between 1946 and 1956, it is sufficient to note that the post-war shortages which existed ten years ago on Panhandle's system (as well as all other pipelines), have been remedied. Within that period, Panhandle increased its capacity by more than 325%. Indeed, during the pendency of the instant proceedings, the Commission adopted a finding that from 1951 to 1955, "Panhandle has never failed to meet the requirements of its utility customers. . . ."[8]

Moreover, the export agreement approved by the Commission in this instance provides for automatic cancellation shortly after completion of Trans

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[6] There was no departure here as the Commission itself pointed out (R. 1321); see, e.g., the identical condition attached to the export permit in *Tennessee Gas Transmission Co.*, FPC Opinion No. 261, issued Sept. 1, 1953, at pages 39-40 (mimeo.).

[7] Michigan Consolidated asserts that the Commission reported its prior "policy" to Congress ten years ago (Pet. 12) but that characterization is not the Commission's. Reference to the report will disclose that it is simply a listing of the rate, certificate, accounting and other matters disposed of, submitted by the Commission each fiscal year.

[8] Decision entered Dec. 14, 1954, adopted by Commission order of January 20, 1955, Docket No. G-1116 et al.

Canada's pipeline project which is being constructed, and nearing completion, at the present time. These and many other factors must be taken into consideration so that, in reason as well as in law, the drafting of conditions in export permits is purely an administrative function.

Michigan Consolidated's final argument seeks to erect an inconsistency between the opinion of the court below and certain language in a prior ruling of the Court of Appeals for the District of Columbia Circuit in the *City of Pittsburgh* case.[9] No matter how the words in the two opinions are rearranged, the alleged inconsistency can have no bearing upon the validity of Panhandle's export authorization because admittedly, the Commission in the instant case followed strictly the procedure required in *City of Pittsburgh*.

In *City of Pittsburgh*, the Commission granted certificates to a pipeline after *excluding* all evidence concerning alternative proposals of the intervenors. The Commission also *excluded* all evidence concerning the pipeline's future expansion plans. The Court of Appeals held this to be error depriving the intervenors of their right to a fair hearing, and directed the Commission to admit the proffered evidence.

In the instant case, the Commission followed both the letter and the spirit of that ruling.[10] It admitted all the evidence offered by Michigan Consolidated but, after full and careful consideration, found the evidence to be insufficient. On review, the court below

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[9] *City of Pittsburgh et al.* v. *Federal Power Commission*, 237 F. 2d 741 (1956).

[10] The court decided *City of Pittsburgh* three months before the Commission's decision in the instant case.

affirmed, expressly following the rule laid down by this Court in *Federal Power Commission* v. *Natural Gas Pipeline Co.*, 315 U.S. 575, 586, as follows:

> "Agencies to whom this legislative power has been delegated are free, within the ambit of their statutory authority, to make the pragmatic adjustments which may be called for by particular circumstances. Once a fair hearing has been given, proper findings made and other statutory requirements satisfied, *the courts cannot intervene* in the absence of a clear showing that the limits of due process have been overstepped. If the Commission's order, as applied to the *facts before it* and viewed in its entirety, produces no arbitrary result, our inquiry is at an end."

Michigan Consolidated does not claim that "the limits of due process have been overstepped." It does not claim that the Commission excluded any proffered evidence, or denied it a fair hearing, or failed to consider any evidence or arguments presented.

Turning to the specific phrases in the lower court's decision which Michigan Consolidated alleges to be inconsistent with language in the *City of Pittsburgh* case, it is apparent that there is neither conflict nor grounds for further review. Although, as stated in the petition (Pet. 4-5), Panhandle "had long sought permission to reduce its deliveries to Petitioner" and then filed an application to abandon service, Michigan Consolidated made no attempt whatever to introduce evidence before the Commission which could show any relationship between that long-pending dispute and Panhandle's proposal to export gas to Union Gas.[11]

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[11] Nor has any attempt been made by Petitioner to reopen the export proceeding, or to adduce additional evidence as provided for by Section 19(b) of the Act. 15 U.S.C. § 717r(b).

Nevertheless, Michigan Consolidated now claims that the court below (but not the Commission) erred in failing to "consider" the abandonment proposal. In attempting to support this criticism, Michigan Consolidated relies solely upon the *City of Pittsburgh* case, but in that case the Commission excluded all evidence concerning future expansion, a matter directly related to the certificate there under consideration. In the instant case, not only was no evidence excluded, but there is no relationship between the export deliveries and the proposal to discontinue service to Michigan Consolidated. All of Panhandle's deliveries to Michigan Consolidated are firm sales as distinguished from the interruptible gas involved in the export proceeding.

Michigan Consolidated argued before the court below, as it does here, that "the pendency of Panhandle's abandonment application" (Pet. 19) should be "considered" by the court in passing upon Michigan Consolidated's claim that there is a "need for additional *firm* gas on the part of Panhandle's domestic customers" (Pet. 18). But, that claim has no relationship to the export proposal because the gas being exported is not firm, but *interruptible* gas. As the court below stated, "Its export, therefore, will not reduce in any way the amount of gas which Panhandle will have available to meet the winter peak-day requirements of its *firm-demand* customers." (Pet. 13a)

Moreover, Michigan Consolidated's demand that the court below "consider" the abandonment proceeding was not, as it now suggests (Pet. 19), limited to the "pendency" of the application. There was considerable embellishment of this matter during oral argument, at which time counsel for Michigan Con-

solidated misinterpreted the theory underlying Panhandle's abandonment proposal in the other case. Opposing counsel attempted to correct this impression by explaining that the proposal is based principally upon the large surplus of gas which Michigan Consolidated has had since the commencement of deliveries by its new affiliated pipeline, American Louisiana. Thus, the court below was faced with contradictory arguments concerning a partially completed record being made in another proceeding still pending before the Commission. The court had no alternative but to state, as it did, that the abandonment controversy "is not here today on the present record and we do not consider it" (Pet. App. 17a).[12] The *City of Pittsburgh* case clearly has no bearing upon this situation.

The alleged conflict between circuits concerning "alternative" proposals is also non-existent. In *City of Pittsburgh,* the Commission had excluded the evidence, whereas in the instant case, all the proffered evidence was admitted. The alternative proposal in *City of Pittsburgh* was inconsistent with that of the applicant, and the consummation of applicant's proposal would have prevented any possibility of accomplishing the alternative. Here, the so-called

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[12] The abandonment proceeding is consolidated with American Louisiana's expansion application. Although none of that record was before the court, it had considerable appreciation of the complexities there involved as well as the lack of relationship between that case and the instant matter, having recently decided three cases dealing with earlier phases of the abandonment and American Louisiana problem. *Panhandle Eastern Pipe Line Company* v. *Federal Power Commission,* 204 F. 2d 925 (3rd Cir. 1953); *Panhandle Eastern Pipe Line Company* v. *Federal Power Commission,* 219 F. 2d 729 (3rd Cir. 1955) cert. den. 345 U.S. 945; *Panhandle Eastern Pipe Line Company* v. *Federal Power Commission,* 236 F. 2d 289 (3rd Cir. 1956).

alternative, relating to development and utilization of storage, is in no way inconsistent with the export, and Michigan Consolidated does not even claim that the delivery of this surplus gas to Union Gas can affect, interfere with, or prevent the development or utilization of a storage field by Panhandle. In fact, Panhandle presented uncontroverted evidence of its ability as well as its intention to do both (R. 16-75).

Michigan Consolidated's statement that Panhandle is "unwilling to develop its storage field in the United States" (Pet. 2) is simply not true, nor was that the basis of the controversy before the Commission. The dispute stemmed from the fact that Panhandle was and still is actively developing the Waverly Storage Field, in Illinois, whereas Michigan Consolidated argued that Panhandle should convert one of its producing gas fields, located in Michigan, into a storage field.[13] The argument that Panhandle should be denied export authorization because it has not abandoned its Waverly Storage project in favor of the plan advanced by Michigan Consolidated is a complete non sequitur. Michigan Consolidated, of course, "makes no demand for this gas for itself" (Pet. 15a).

In contrast to the action which it took in the *City of Pittsburgh* case, the Commission here permitted Michigan Consolidated to present all of its evidence concerning Howell Field. Michigan Consolidated represents to this Court that "it introduced uncon-

[13] Michigan Consoldiated persistently refers to this as "Howell Storage Field," but the evidence showed that it is not a "storage" field, but an excellent producing field from which Panhandle was, and still is, selling gas to utility customers.

tradicted evidence of the feasibility of that operation" (Pet. 13). However, its own witness admitted, "any costs that I might give on the operation of that would be pure guesses" (R. 556).[14] Thus, Michigan Consolidated's failure of proof was not, as it suggests here, merely one of lack of details, which the Commission could have directed Panhandle to produce (Pet. 16). Because "material evidence is lacking respecting geological matters, operational cost items and other matters which it is necessary to consider," there was simply nothing before the Commission to indicate that Howell Field "can or should be developed for storage," and the Commission so found (R. 1318).

Having failed to show that it would be feasible or desirable to convert Howell Field into a storage field, Michigan Consolidated argued in the court below that the Commission was required *as a matter of law* to obtain further information by directing Panhandle to show cause why the field should not be so developed. If any such rule were imposed upon the Commission it would be stripped of discretion, and the Commission would be required to force pipeline applicants to compile data, make studies, and present evidence regarding any suggestion advanced by a hostile intervenor. Of course, in the *City of Pittsburgh* case, that burden rested upon the intervenors, not upon the applicant or the Commission. The court's action here is wholly consistent with that decision.

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[14] Michigan Consolidated's witness further admitted that he did not know what would have to be done to connect the field to Panhandle's pipeline, and that he was not qualified to testify concerning geological matters and deliverability (R. 554).

The alleged conflict urged by Michigan Consolidated is said to stem from a "holding" which it attributes to the court below (Pet. 15):

> "The decision below . . . holds that the Commission *need not consider* more desirable alternative proposals, in determining the public interest, if it has no power to compel the applicant to adopt such proposals."

On the contrary, the court did not say that the Commission need not consider the alternative proposal. It said that the Commission had, in fact, considered the proposal, and the conclusion reached by the Commission was affirmed. The Commission is not required *as a matter of law* to go further and obtain additional material by issuing a show cause order.

In view of Panhandle's continuing development of its Waverly Storage Field, there has never been any issue in this case regarding the Commission's power, or lack thereof, to force Panhandle to develop storage facilities. Nevertheless, Michigan Consolidated repeatedly (Pet. 2; 7; 13; 14; 15) represents that:

> "As previously stated, the court below affirmed the Commission's order on the ground that *since* the Commission's authority to order Panhandle to develop and utilize its Howell Field for storage is 'more than doubtful', the Commission was under no obligation to ascertain the feasibility of such an 'alternative proposal.'" (Pet. 14).

Here again, the court simply did not say this. In fact, the court expressly stated that it was not basing its decision of the "show cause" issue upon any determination of the Commission's power to order development. After mentioning the doubt concerning

enforced development, the court prefaced its conclusion with the words, "However, this may be." The issuance of show cause orders is purely discretionary and presents no reviewable question.

CONCLUSION

The decision below turned on the particular facts of this case and is clearly correct. There is no conflict of decisions and no need for further review. It is respectfully submitted that the petition for a writ of certiorari should be denied.

Respectfully submitted,

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